

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**CRM-M-12823-2021(O& M)****Date of decision: 10.01.2023**

Ashok Kumar

.... Petitioner

V/s

State of Punjab and another

...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Tejeshwar Singh, Advocate,
for the petitioner.

Ms. Ramta Chaudhary, DAG, Punjab.

JASJIT SINGH BEDI, J. (Oral)

The prayer in the present petition under Section 482 Cr.P.C. is for quashing of the FIR No.10 dated 01.02.2019 under Sections 103 and 104 of the Trade Marks Act, 1999 (in the original FIR, offences under Sections 63 and 65 of the Copyright Act,1957 were there. However, at the time of the filing of the challan, the said offences were deleted and changed to Sections 103 and 104 of the Trade Marks Act, 1999), Police Station Mahilppur, District Hoshiarpur, Punjab (Annexure P-1), order dated 01.02.2021 whereby the charges were framed by the Court of JMIC, Garhshankar, District Hoshiarpur (Annexure P-4) and all subsequent proceedings arising therefrom.

2. The brief facts as emanating from pleadings are that one Vishal Joshi, Enforcement Officer, son of Ram Parkash Joshi, United Overseas Trade Mark Company 52, Sukhdev Vihar, Mathura Road, New Delhi, submitted an application to the Incharge Police Post Saila Khurd, Hoshiarpur, regarding manufacturing of duplicate bags etc. and selling the

same in the name of their authorized company “North Face” and “Jansport”. It was stated in the complaint that he was posted as Enforcement Officer in the said company. On 01.02.2019, he had conducted a survey of Saila Khurd Market and had come to know that Ashok Kumar son of Purshotam Lal, owner of Amar Bag House was indulging in manufacturing, selling and supplying duplicate bags, etc. in the name of their authorized company “North Face” and “Jansport”. If a raid was conducted, a huge quantity of duplicate products could be recovered. Legal action was sought.

Based on the application, FIR No.10 dated 01.02.2019 under Sections 63, 65 of the Copyright Act, 1957 was registered against the petitioner at Police Station Mahilpur, District Hoshiarpur. A copy of the aforesaid FIR is attached to the petition as Annexure P-1.

3. During investigation, the police of Police Station Mahilpur raided the shop of the petitioner and apprehended him. The search of the shop was conducted and 15 packets of bags each containing 04 pieces totalling 60 pieces, black in colour with the Mark “North Face” were recovered from the shelf of the shop. Similarly, 19 packets of bags, colour black, each containing 04 pieces, totalling 76 bags Mark “Jansport” were recovered. The marks on the recovered bags were checked by the complainant at the spot and the test report was obtaining. All the bags were purportedly fake. They were taken into the police possession vide separate memos of recovery. A wooden board bearing the company’s sticker having the mark “Jansport” was also recovered.

4. After the completion of the investigation, the report under Section 173(2) Cr.P.C. was initially prepared under Sections 63, 65 of the Copyright Act and the same was sent for the checking to the office of the District Attorney, Hoshiarpur, who gave an opinion that offences under

Sections 103 and 104 of the Trade Marks Act, 1999 (for short 'the Act') were made out and the offence under Sections 63,65 of the Copyright Act,1957 was deleted. Thereafter, the report under Section 173(2) Cr.P.C. was presented under Sections 103 and 104 of the Act. A copy of the said report is attached to the petition as Annexure (P-2).

Based on the afore-mentioned report, charges were framed against the petitioner under Sections 103 and 104 of the Act. A copy of the order dated 01.02.2021 is attached as Annexure P-4 to the petition.

The present petition came to be filed challenging the FIR (Annexure P-1) the order framing charges (Annexure P-4) and all subsequent proceedings arising therefrom.

5. The primary contention raised in the petition is that under Section 115(4) of the Act, only a police officer above/equal to the rank of Deputy Superintendent of Police could conduct the search and seizure without warrant and secondly, the police officer concerned was required to obtain the opinion of the Registrar of Trade Marks prior to the Deputy Superintendent of Police making any search or seizure. It was contended that the entire search and seizure had been undertaken by a Sub Inspector and an Assistant Sub Inspector. Therefore, since the mandatory requirement of obtaining the prior opinion of the Registrar has not been complied with, and the raid was not conducted by a Deputy Superintendent of Police level officer, the entire search and seizure stood vitiated, and therefore, the proceedings against the petitioner ought to be quashed. Reliance is placed on the judgments passed in the cases of "Anil Kumar versus State of Punjab and another (CRM-M-9229-2009 decided on 22.03.2011)", Satpal and another versus State of Punjab and others (CRM-M-23090-2009 decided on 11.10.2010), Kasim Ali s/o Akbar Ali and another versus State of Madhya

Pradesh and another (CRM-M-1362-2015 decided on 13.06.2016), Pitambra Industries versus State of Madhya Pradesh and others (Writ Appeal No.459 of 2018 decided on 19.04.2018) and Shrenik Shantilal Dhandiwal versus State of Maharashtra and others (Criminal Application No.1289 of 2007 decided on 01.08.2018)”.

6. Initially, notice of motion was issued on 19.03.2021. Thereafter, on 14.10.2021, the proceedings were stayed for a period of 02 months. The said interim order continued from time to time.

7. Meanwhile, the State filed a reply dated 06.04.2022. In the said reply, only a sequence of events as narrated hereinabove has been reiterated and there is no specific denial to the contentions raised in the petition.

8. The learned counsel for the petitioner contends that the entire search and seizure in the present case was conducted by an officer of the rank of a Sub Inspector or Assistant Sub Inspector. As per Section 115 (4) of the Act, the search and seizure was to be conducted by the officer of the rank of a Deputy Superintendent of Police or above. Further, the officer making any search or seizure ought to have obtained the opinion of the Registrar on the facts involved in the offence relating to the Trade Mark and only then proceed to conduct the raid. He, thus, contends that in view of the judgment in “State of Haryana and others versus Bhajan Lal and others, 1992 Supp. (1) 335”, once there is a specific bar to the initiation of the proceedings, the FIR and the subsequent proceedings arising therefrom are liable to be quashed.

9. The learned counsel for the State, on the other hand, contends that pursuant to the filing of the FIR, a report under Section 173(2) Cr.P.C. was presented. Pursuant thereto, charges had been framed. The grounds raised by the petitioner would be a matter of adjudication during Trial and

as such proceedings should not to be quashed. She, however, concedes that in the reply dated 06.04.2022, there is no specific denial to the contentions raised by the petitioner.

10. According to the report dated 18.11.2021 from the Registry, Respondent No.2-complainant Vishal Joshi was served through his wife. However, thereafter, a notice issued to him was not received back served or otherwise. However, I am proceeding to decide the present case as the arguments raised by the petitioner are legal in nature and no factual contentions have been raised so as to warrant a response from the private respondent No.2/*de facto* complainant.

10. I have heard the learned counsel for the parties.

11. Before proceeding further, it would apposite to refer to Section 115 of the Act and the same is reproduced hereinbelow:-

“115. Cognizance of certain offences and the powers of police officer for search and seizure:-

(1) No court shall take cognizance of an offence under section 107 or section 108 or section 109 except on complaint in writing made by the Registrar or any officer authorised by him in writing:

Provided that in relation to clause (c) of sub-section (1) of section 107, a court shall take cognizance of an offence on the basis of a certificate issued by the Registrar to the effect that a registered trade mark has been represented as registered in respect of any goods or services in respect of which it is not in fact registered.

(2) No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the first class shall try an offence under this Act.

(3) The offences under section 103 or section 104 or section 105 shall be cognizable.

(4) Any police officer not below the rank of deputy superintendent of police or equivalent, may, if he is satisfied that any of the offences referred to in sub-section (3) has been, is being, or is likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be:

Provided that the police officer, before making any search and seizure, shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

(5) Any person having an interest in any article seized under sub-section (4), may, within fifteen days of such seizure, make an application to the Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be, for such article being restored to him and the Magistrate, after hearing the applicant and the prosecution, shall make such order on the application as he may deem fit.

12. This Court and the other Hon'ble High Courts have examined the controversy raised in the present petition and some of these judgments in that regard are reproduced hereinbelow:-

This Court in "Anil Kumar versus State of Punjab and another (supra)", held as under:-

"As per sub-clause (4) of Section 115 of the Trademarks Act, 1999, no police officer below the rank of Deputy Superintendent of Police can search and seize goods regarding offence under Sections 103, 104 and 105. Secondly, as per the proviso, the said police officer will have to obtain opinion of the Registrar on facts involved in the offence relating to Trademarks Act, 1999 and shall abide by the opinion before

such search and seizure is carried out. In the present case, admittedly the search and seizure had been done by the Sub Inspector without taking any opinion from the Registrar. Hence, the proceedings are vitiated. The word “shall” in the proviso is indication of the fact that the provision is indeed mandatory. Moreover, the said offences could have only been investigated by the Officer not below the rank of Deputy Superintendent of Police.”

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“The above parameters are applicable as neither the provision of Copy Right Act are applicable in the present case nor the offence under Section 420 is made out, proceedings under Section 78/79 of the Trade Mark Act, 1999 are vitiated for non-compliance of Section 115 of Trade Mark Act, 1999.”

This Court in the case of “Satpal and another (supra)”, has held as under:-

“As per sub-clause (4) of Section 115 of the Trademarks Act, 1999, no police officer below the rank of Deputy Superintendent of Police can search and seize for goods regarding offence under Sections 103, 104 and 105. Secondly, as per the proviso, the said police officer will have to obtain opinion of the Registrar on facts involved in the offence relating to Trademarks Act, 1999 and shall abide by the opinion before such search and seizure is carried out, whereas, in the present case, admittedly the search and seizure had been done by the Sub Inspector without taking any opinion from the Registrar. The proceedings are, therefore, vitiated. The word “shall” in the proviso is indication of the fact that the provision is indeed mandatory. Moreover, the said offences could have only been investigated by the Officer not below the rank of Deputy Superintendent of Police”.

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“Therefore, applying the test in the facts of the present case, the same falls in both of the above categories. Admittedly, the present case does not fall under the Copyright Act, 1957. The proceedings are, therefore, patently illegal. The mandatory provisions of the Trademark Act, 1999 while registering the FIR have not been complied with resulting in legal bar to the registration of the FIR. When statutes, which create an offence provide for a procedure, the courts or the authorities cannot ignore the same”.

The High Court of Madhya Pradesh in “Kasim Ali s/o Akbar Ali and another versus State of Madhya Pradesh and another (CRM-M-1362-2015 decided on 13.06.2016)”, held as under:-

“15. There is allegation in the FIR that the applicants were using the same trade mark or a deceptively similar trade mark to goods or package containing goods, which is registered in the name of Vertex Manufacturing Co. There by they have committed the offence defined under Section 102 which is punishable under Section 103 of the Act, 1999. Section 115 (3) of the Act, 1999 provides that the offences under Section 103, Section 104 and Section 105 shall be cognizable. Sub-section (4) of Section 115 provides that any police officer not below the rank of Deputy Superintendent of Police, if he is satisfied that an offence under Section 103 or 104 or 105 has been committed or is likely to be committed, may search and seize goods, die, block, machine etc. without warrant. It is also provided that before making any search and seizure, he shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.

16. In the present case, no such opinion has been obtained from the Registrar and search and seizure has been conducted by the Sub Inspector. Thus, the mandatory provisions of the Act, 1999 have not been complied with. When statutes, which create an offence provide for a procedure the Court or the authorities

cannot ignore the same. In the present case, the procedure provided under Section 115 of the Act, 1999 has not been complied with, therefore, the Court is not competent to take cognizance of the offence under Section 103 of the Act, 1999.

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18. With the aforesaid, it is clear that the Court has wrongly taken the cognizance for the offence under Section 63 of the Act, 1957 and under Section 420 of IPC and from the facts the applicants may be prosecuted for the offence under Section 102 read with Section 103 of the Act, 1999. However, the mandatory procedure provided under Section 115 of the Act, 1999 has not been complied with. Hence, applicants cannot be prosecuted for offence under Trade Marks Act, 1999. Therefore, to continue such proceedings is miss use of process of law.

19, Accordingly, this petition is allowed. The FIR registered at Police Station Sadar Bazar, Indore at Crime No.12/2014 for the offence under Section 420 of IPC and under Section 63 of the Copyright Act, 1957 is hereby quashed and further proceedings in Criminal Case No.19746/2014 pending before JMFC, Indore against the applicants are also quashed”.

In Pitambra Industries versus State of Madhya Pradesh and others (Writ Appeal No.459 of 2018 decided on 19.04.2018), the Madhya Pradesh High Court held as under:-

“7. On perusal, it is apparent that for an offence under Sections 107, 108 and 109 of the Act, the cognizance can be taken on filing a complaint in writing by the Registrar, and the Courts of Metropolitan Magistrate and Judicial Magistrate First Class are empowered to try the offences under this Act. But the offences under Sections 103, 104 and 105 of the Act, shall be cognizable and if these offences are required to be registered, then it ought to be by an officer not below the rank of Deputy

Superintendent of Police on being satisfied that the offence has been committed. Sub-section 4 of Section 115 of the Act makes it clear that the police officer who is taking cognizance in the said offence shall obtain opinion of the Registrar on the facts involved in the offence relating to Trade Mark and shall abide the opinion so obtained before making any search and seizure. However, to obtain an opinion is a sin-qua-non and it must be abide by the Police Officer at the time of search and seizure, therefore, such compliance is mandatory to the police officer prior to search and seizure in case an offence is registered under section [103](#), [104](#) and [105](#) of the Trade Marks Act.

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10. During the course of hearing when this Court asked to produce the opinion of the Registrar, learned Govt. Advocate informed that the opinion of the Registrar has not yet obtained in the present case and also not available in the case diary. Looking to the facts of the case and in view of the discussion made hereinabove, it is apparent that an offence under sections [103](#), [104](#) and [105](#) of the Trade Marks Act was registered against the appellant by the Deputy Superintendent of Police, however, for the purpose of search and seizure, he is required to take an opinion from the Registrar and to abide the same as per section [115](#)(4) of the Trade Marks Act . In the present case, no such opinion has been obtained, however, the search and seizure without the opinion in furtherance to the registration of an offence is illegal and not valid, therefore, the prayer as made in the writ petition deserves to be allowed holding that lock put on the factory premises is without jurisdiction and not in accordance with the provisions of the Trade Marks Act.

11. It is trite law that in case the action taken by the authority is in violation of the provisions of the Act and Rules, without jurisdiction or in non-observance of the principle of natural justice, the interference in exercise of the power under

Article [226](#) of the Constitution of India is not barred. In this regard guidance can be taken from the judgment of Whirlpool Corporation (*supra*). In addition, it is to observe, that the finding of learned Single Bench, that the appellant may apply for restoration of the articles before the Metropolitan Magistrate but it has not been considered that the search and seizure made under section [115](#)(4) of the Trade Marks Act can be made by the Police Officer.

12. As discussed above, it is clear that upon taking the cognizance by the Deputy Superintendent of Police for an offence under sections [103](#), [104](#), [105](#) of the Trade Marks Act for the purpose of search and seizure, the opinion from the Registrar to the facts involved relating to the trade mark is necessary, which ought to be abided by such officer. In absence of the opinion of the Registrar and without abiding it, the search and seizure made by the Police Officer is illegal and without jurisdiction. Once the action of the authority is found as illegal and without jurisdiction, invoking the jurisdiction under Article [226](#) of the Constitution of India is not barred. In addition, when the challenge made to the search and seizure is itself found illegal and against such action alternative remedy is not provided in the Act. The remedy under section [115](#)(5) of the Trade Marks Act is of restoration to the articles seized during search and seizure, which cannot be said to be efficacious remedy to challenge the search or seizure and it is only for restoration of the articles so seized, therefore, the finding as recorded by the learned Single Judge dismissing the writ petition stands set aside”.

The Bombay High Court in the case of “Shrenik Shantilal Dhadiwal versus State of Maharashtra and others (Criminal Application No.1289 of 2007 decided on 01.08.2018)” held as under:-

“11. On perusal of papers of investigation it appears in the present matter that the investigation was carried by Assistant Police Inspector, Local Crime Branch, Ahmednagar. Further-

more, no opinion of the Registrar is taken before carrying the investigation. At the initial stage matter requires to be examined by the expert i.e. the Registrar. Therefore, the investigating officer has to act upon the opinion given by the Registrar. Herein the present case no such opinion of the Registrar was taken by the investigating officer, nor the alleged offence is investigated by the officer not below the rank of Deputy Superintendent of Police. So the above two facts are in contravention of provisions of section [115](#) sub clause 4 and its proviso clause. So basically the investigating officer was not authorized to carry the investigation and due to such irregularity committed by the investigating officer he was not authorized to investigate the matter and file the charge sheet”.

In “State of Haryana and others versus Bhajan Lal and others, 1992 Supp. (1) 335”, the Hon’ble Supreme Court has observed as under:-

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercise:.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge”.

13. In the present case, firstly, the search and seizure has been conducted by an officer of the rank of Sub Inspector as is borne out from the recovery memo of (Annexure P-3) and the report under Section 173(2) Cr.P.C. (Annexure P-2). As per the mandate of Section 115(4) of the Act,

the raid and the consequential search and seizure had to be conducted by an officer not below the rank of Deputy Superintendent of Police or is equivalent. Therefore, there is a clear violation of Section 115(4) of the Act, and therefore, the proceedings emanating out of the present FIR are liable to be quashed.

14. As per the proviso to Section 115(4) of the Act, the police officer concerned who ought to be of the rank of Deputy Superintendent of Police or equivalent thereto would have had to obtain an opinion of the Registrar of the Trade Marks prior to initiating the proceedings for search and seizure. The same has also not been done in the present case. The Sub Inspector concerned (who was otherwise not competent) has not obtained any opinion of the Registrar as envisaged under the proviso to Section 115(4). The proceedings are liable to be quashed on this ground as well.

15. The Hon'ble Supreme Court in "Bhajan Lal and others' case (supra)", has held that proceedings could be quashed where there is a legal bar engrafted in any of the provisions of the Code or in the Act concerned (under which the criminal proceedings are instituted) to the institution and continuation of the proceedings.

In the present case, the provisions of Section 115(4) of the Act have been clearly violated on two counts: firstly, the entire search and seizure was undertaken by an officer below the rank of a Deputy Superintendent of Police and secondly, the proceedings were initiated without the opinion of the Registrar, Trade Marks. Thus, there is a clear statutory embargo to the initiation and continuance of proceedings in the present case.

16. In view of the above, the present petition is allowed. The FIR No.10 dated 01.02.2019 under Sections 103 and 104 of the Trade Marks Act,

at Police Station Mahilpur, District Hoshiarpur, Punjab (Annexure P-1), order dated 01.02.2021 whereby the charges were framed by the Court of JMIC, Garhshankar, District Hoshiarpur (Annexure P-4) and all subsequent proceedings arising therefrom are hereby quashed.

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(JASJIT SINGH BEDI)
JUDGE

January 10, 2023
sukhpreet

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No